

District 3

129 North Independence Street
Tipton, Indiana 46072

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND OF THE CASE

The Permittee, American Legion Post No. 0046, 129 North Independence Street, Tipton, Indiana 46072 (Permittee) is the holder of a type 211-4¹ Alcohol and Tobacco Commission (ATC) permit, #RC80-00192. On or about August 29, 2002, permittee filed its request for renewal and that application was assigned to the Tipton County Local Board (LB) for hearing. The LB heard the renewal request on November 25, 2002, and on that same day, voted 4-0 to deny the application. The ATC adopted the recommendation of the LB on or about December 9, 2002, and denied the renewal application.

The permittee filed a timely notice of appeal and the matter was assigned to the ATC Hearing Judge, Mark C. Webb (HJ). The HJ assigned the matter for hearing on April 16, 2003, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The permittee was represented by attorney Julie L. Pottenger. There were no remonstrators. The HJ took judicial and administrative notice of the entire contents of the file in this matter and now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

A. EVIDENCE PRESENTED BEFORE THE LOCAL BOARD²

1. On March 3, 2002, Officer Steven Toleos entered the permit premises to check on a Sunday operating permit.
2. Inside the premises in Officer Toleos' full view were 8 video gaming machines, along the walls of the room, all turned off. The screen and back of one of the machines was warm to the touch as if it had been

¹ Liquor, beer and wine retailer, fraternal club.

² The information presented before the LB consisted almost entirely of the contents of State Excise Police Officer Steven Toleos's report of 3-3-02, which was presented through LB member Kevin Akers, the ATC appointee. Toleos himself did not appear or testify at the hearing. Additionally, no witnesses actually testified against the renewal of the permit. Officers of the permittee did appear and answer board members' questions regarding the report.

recently turned off. Each machine also contained a “knock off” switch on the back.³

3. After identifying himself, Officer Toleos asked the bartender⁴ if the establishment still paid five cents per point from the drawer located beneath the cash register, and was told yes.
4. Officer Toleos then confiscated the monies from the bottom cash drawer totaling \$2400.25 and issued a notice of violation to the permittee.
5. The gaming machines in question were removed from the premises shortly after the March 3, 2003 violation, but were returned soon after because without the proceeds from them, permittee was having difficulty meeting its operating financial commitments.⁵
6. As of the LB hearing the gaming machines in question were still on the permit premises.

B. EVIDENCE PRESENTED BEFORE THE ATC

1. Permittee was cited for another gaming violation on February 26, 2003.
2. Sometime before the ATC hearing, the gaming machines in question were removed from the premises, and as of the ATC hearing, April 16, 2003, there were no gaming machines on the permit premises.
3. Counsel for the permittee presented written evidence from the LB that had said gaming machines been removed permanently from the permit premises, that they would have voted to renew the permit in this case.⁶
4. Officers of the permittee testified that they would no longer allow gaming machines of any kind inside the permit premises.⁷

³ Officer Toleos believed that the machines were recently turned off because he issued a warning to another club in Tipton approximately 15 minutes before. All illegal gaming machines pay off monetarily based on the number of points accumulated by the particular user. A “knock off” or reset switch sets the machine point total back to zero (0) after the current user is through and gets “cashed out”. Although some of the newer machines utilize a remote switch, much like a garage door opener button, mounted under the bar, the presence of such a device makes it possible to reset the machine between users and helps establishments keep obligatory payouts to a minimum. No such device is present on amusement devices such as pinball machines which automatically reset when money is put in them.

⁴ Mary E. Keifer, BR1127332.

⁵ The exact dates of the machines’ removal and their re-entry onto the permit premises are not disclosed by the lodge officials’ testimony at the LB hearing.

⁶ Permittee submitted as its Exhibits 1, 2 and 3, respectively, the April 14 affidavits of LB members Raymond G. Chapman, Frank E. Letsinger and John D. Colter. Permittee did not submit an affidavit from LB and Commission appointee Kevin Akers, Indiana State Excise Police.

⁷ Prior to the issuance of these Findings and Conclusions, this HJ requested an inspection by the District 3 Excise Police and was informed that upon an unannounced inspection, that there were no gaming machines of any kind inside the permit premises.

II. FINDINGS OF FACT

1. The Permittee, American Legion Post No. 0046, 129 North Independence Street, Tipton, Indiana 46072 (Permittee) is the holder of a type 211-4 Alcohol and Tobacco Commission (ATC) permit, #RC80-00192. (ATC File).
2. Said permit was first issued on July 12, 1988 and has been renewed annually thereafter. (ATC File).
3. On March 3, 2002, permittee received a violation for the possession of illegal gaming machines on the permit premises. (ATC File).
4. Shortly after the March 3, 2002 violation, the illegal gaming machines at issue were removed from the permit premises, but later returned in an effort to help permittee pay its financial obligations.⁸ (LB Hearing).
5. As of the November 25, 2002 LB hearing, the illegal gaming machines were still on the permit premises. (LB Hearing).
6. Permittee has been cited for the illegal possession of gaming devices on other occasions.⁹ (ATC File).
7. The only reason that the LB did not recommend renewal of the permit at issue was because permittee failed to rid itself of the gaming machines at the time of the LB hearing. (ATC Hearing).
8. Had permittee divested itself of the illegal gaming machines in question at the time its case was heard by the LB, then the LB would have recommended renewal of the permit in this case. (ATC Hearing).
9. As of the April 16, 2003 ATC hearing in this matter, permittee had divested itself of the illegal gaming machines in question. (ATC Hearing).
10. Permittee has pledged that it will no longer allow gaming machines in its permit premises in the future. (ATC Hearing).
11. The LB has indicated in writing that so long as the gaming machines have been removed from the premises, it has no objection to the permit in this matter being renewed.¹⁰
12. Within the past two months, Excise Police made an unannounced visit to the permit premises and determined that permittee was in compliance with the law and that the gaming machines in question had been permanently removed from the premises.
13. There were no remonstrators who objected to the permittee's request for renewal of its permit.

⁸ Permittee's financial obligations also included its well-known philanthropic involvement throughout the community.

⁹ On July 28, 2001, permittee received a similar violation and resolved it by paying a \$750 fine and forfeiting \$1918 contained in the payout drawer. On December 22, 1994, permittee received a similar violation and resolved it by paying a \$750 fine. On February 26, 2003, after the violation in the instant matter, permittee was cited again and paid a fine of \$1250 and forfeited the sum of \$1390. Permittee also received warnings on July 3, 1989 and July 7, 2001.

¹⁰ This HJ accepts this information and believes that the same is true as of the date of the issuance of these findings.

III. CONCLUSIONS OF LAW

1. Permittee, American Legion Post No. 0046, 129 North Independence Street, Tipton, Indiana 46072, is the holder of a Type 211-4 Alcohol & Tobacco Commission permit, #RR80-00192.
2. The ATC's standard of review of the LB's recommendation is *de novo*. IC 7.1-3-19-11(a).
3. Under a *de novo* standard, permittee is permitted to present new evidence before the Commission. *Id.*
4. The information that the gaming machines at issue have been permanently removed from the permit premises, as well as the LB's agreement that under those circumstances the permit should be renewed is new evidence which was not presented to the LB.
5. Said new evidence is material, in that there would likely be a different result before the LB if a hearing were held at the present time.¹¹

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that based on the additional evidence submitted before the ATC, the finding of the Tipton County LB to deny the application in this matter was unsupported by evidence and is hereby reversed. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the appellant and against the recommendation of the LB and the appeal of Permittee, American Legion Post 0046, 129 Independence Street, Tipton, Indiana 46224, Permit No. RC80 00192, for renewal of its Type 211-4 permit is granted and the application for renewal of said permits applied for is hereby granted.

DATED: _____

MARK C. WEBB, Hearing Judge

¹¹ Normally this HJ would remand the matter back to the LB for consideration of the new evidence before attempting to review it under the statutory criteria enumerated in IC 7.1-3-19-11. However, because a majority of the LB has agreed in writing that the permit in this matter should be renewed under the facts as they are now known to be, this HJ sees no need for a remand which would require, *inter alia*, the additional costs of readvertisement as well as a further delay in the ultimate resolution of this matter, and in which the outcome has been already decided.